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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 591

NEW ENGLAND MOTOR RATE BUREAU, INC., et al., and ACME FAST FREIGHT, INC., et al.,

Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

RAILWAY EXPRESS AGENCY, INC.,
Appellee, by its attorney,
WILLIAM Q. KEENAN
219 East 42nd Street
New York, N. Y. 10017

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PAGE

INDEX

	PAGE
Statement	1
Argument	6
Conclusion	16
Certificate of Service	17
Appendix A—Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission *en banc* in Docket 33977	19

TABLE OF CASES CITED

ABC Freight Forwarding v. *United States*, 169 F. Supp. 403, 405 (S.D., N.Y. 1959) 12

Ace Lines, Inc. v. *The United States*, 197 F. Supp. 591, 598-599 (S.D. Iowa 1960) 11

Churchill Tabernacle v. *Federal Communications Commission*, 160 F.2d 244, 246 (App. D.C. 1947) 11, 12

Coyle Lines, Inc. v. *United States*, 115 F. Supp. 272, 279 (E.D., La. 1953) 11

Express Contract, 1959, 308 I.C.C. 545 6

Interstate Commerce Commission v. *New York, N.H. & H.R. Co.*, 372 U.S. 744, 759 (1963) .. 8

Motor Freight Express v. *United States*, 119 F. Supp. 298, 305 (M.D., Pa., 1954) 12

N.L.R.B. v. *Baltimore Transport Co.*, 140 F.2d 51, cert. den. 321 U.S. 795 (4 Cir., 1945) 11

PAGE

Northern Pacific Railway Company v. *United States*, 41 F. Supp. 439, 446 (D. Minn. 1941) aff'd. 316 U.S. 346 (1941) 11

Railway Express Agency, Inc. Extension—Charlottesville, 94 M.C.C. 62 ..... 9n

Railway Express Agency, Inc. Extension—Durant-Kosciusko, 34 M.C.C. 111 (1942) ... 9n

Railway Express Agency, Inc. Extension—Great Falls, S.C., 94 M.C.C. 102 ..... 9n

Railway Express Agency, Inc. Extension—Madison, Wis., 94 M.C.C. 677 ..... 9n

Railway Express Agency, Inc. Extension—Nashua, N.H., 91 M.C.C. 311 (1962) 9n

Railway Express Agency, Inc. Extension—West Unity-Middletown, 31 M.C.C. 363 .... 9n

State Airlines, Inc. v. *Civil Aeronautics Board*, 174 F.2d 510, 518 (App. D.C. 1949), rev'd. on other grounds, 338 U.S. 572 (1950) 12

Transportation Activities of Arrowhead Freight Lines, 63 M.C.C. 573 .....8, 14

Virginia Stage Line v. *United States*, 48 F. Supp. 79 (W.D. Virginia 1942) 11

Western-Inland Mail Rates, 14 C.A.B. 201, 250-251, 253-254 (Docket 2870, Order E-5467, June 26, 1951), modified for other reasons *sub nom. Summerfield* v. *Civil Aeronautics Board*, 207 F.2d 200 (App., D.C. 1953) 12

WOKO Inc. v. *Federal Communications Commission*, 153 F.2d 623, 631 (App. D.C., 1946), rev'd 392 U.S. 223, 227-8 11

Other Authorities Cited

	PAGE
Supreme Court of United States, Revised Rules, Rule 16	1
28 U.S.C.:	
Section 2284	1
Section 2323	2
Section 2325	2
49 U.S.C.:	
Section 5(1)	6
Section 15	4
Section 301 *et seq.*	6

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, Railway Express Agency, Inc. (sometimes hereinafter called R E A), appellee, moves that the judgment of the District Court be affirmed.[1]

Statement

This is a direct appeal from a final judgment entered on May 31, 1966 by a three-judge District Court convened pursuant to 28 U.S.C. 2284 and 2325 dismiss-

[1] The opinion of the District Court is reported at 254 F. Supp. 633.

ing appellants' complaint which had sought to set aside an order of the Interstate Commerce Commission. This order approved interstate common carrier transportation rates published by R E A and R E A was a party to the proceeding before the Commission. Accordingly, R E A was permitted to intervene as a party defendant before the District Court pursuant to the provisions of 28 U.S.C. 2323.

The record below contains a succinct and unrebutted summary of R E A's business supplied by R E A's President:

> "R E A is an express company which holds itself out at all points in the United States to pick up, transport, distribute and deliver small shipments. It is the only transportation agency in the country which combines the following services:
>
> 1. It makes pickup and delivery service available to more than 80% of the population of the United States.
>
> 2. It provides every shipper and every receiver with a small shipment transportation service which is as expedited, safe and certain as the service the shipper can obtain from motor carriers only on truckload quantities.
>
> 3. It carries packages regardless of their size, shape, density, weight, market value, and unusual transportation characteristics.
>
> 4. It discharges its duty to serve the public on all routes without regard to density of traffic or available volume at terminal areas involved.

Consequently, R E A is a very important element in the national transportation market." (Exhibit 1, pp. 1-2)

In 1962 R E A published a new tariff applying between 35 of the several thousand cities served by R E A which decreased the applicable express rate when the shipper was willing to put his shipment in a container furnished by R E A. These container loads each carried an average of 86 packages (Examiner's Report, p. 8). If these 86 packages were not containerized each would have to be handled separately at more than 8 points in the transportation process (Exhibit 42, pp. 6-7; J.S. p. 11a). Thus containerization reduces package handling costs and the idea of the tariff was to pass these cost savings on to those shippers whose willingness to use containers made the savings possible.

As the court below found (J.S. p. 4a), R E A will carry any commodity, whether perishable or not, between any of the cities it serves. Furthermore R E A will carry any containerload between any two points. However, R E A will not furnish the shipper with a container except between the 35 cities named in the container tariff, and then only when the shipper loads into the container what the tariff calls for. R E A gives such containerized traffic just as expeditious service as it gives all other express shipments (J.S. p. 22a).

The report and order of the Interstate Commerce Commission[2] which is the subject of this appeal concerned this tariff schedule of charges for the express

[2] *Freight, all kinds, L.C.L. Container Charges—U.S.A.*, 323 I.C.C. 468 (Docket No. 33977, October 19, 1964).

transportation of cargo in containers between some thirty-five cities in the United States stretching from New York and Washington on the East Coast to Seattle and Los Angeles on the West Coast, and from Minneapolis, Chicago, and Boston in the North to Dallas, New Orleans, and Jacksonville in the South. The charges include supplying the shipper with an R E A-owned wire mesh container of 101 cubic foot capacity, its transportation when loaded to the receiver's address, and its removal from the receiver's premises when unloaded. The charges, established on a point-to-point basis and varying with the length of haul, remain the same regardless of how little or how much the shipper loads in the container up to a maximum of 2,500 pounds; above that limit the shipper pays a per cwt. surcharge up to the maximum engineered container weight limit of 3,000 pounds. The charges apply to any commodity loaded in the container except for a few categories of shipments operationally inappropriate for containerized transportation, for example, human remains, money, live animals, and shipments requiring refrigeration or protection from heat (J.S. pp. 8a, 22a). The Commission found that "these commodities do not appear to lend themselves readily to movements by the described containers" (J.S. p. 22a). No exception was taken to this finding below nor do appellants appear to contest it in this court.

Some of the appellants as competitors of R E A objected to these container rates on the ground that they were too low and filed these objections with the Commission in the form of protests. The Commission, pursuant to Section 15 of the Interstate Commerce Act, 49 U.S.C. sec. 15, began an investigation of the

lawfulness of these rates and, after taking evidence, reviewing an examiner's recommended report, and hearing argument *en banc*, entered an order finding the container rates lawful, declining to cancel them, and discontinuing the investigation. The court below unanimously affirmed the Commission's decision.

The historical economic reason for publishing the container rates under review was described by the Commission as follows:

> "As a result of the increased competition from motor carriers for short-haul traffic and from freight forwarders for long-haul traffic, and the comparatively high rates of respondent for what has come to be generally equivalent service, R E A lost substantial less-than-carload traffic, particularly in the 2,000 to 3,000 pound weight bracket. Its general financial condition steadily deteriorated." (J.S. p. 13a).

The evidence below shows that R E A's container volume amounts to less than 200 containers a week or 10,400 containers a year (J.S. p. 14a). R E A handles about 60 million shipments a year (J.S. p. 12a). The appellant motor carriers have 85% of the available volume in the small shipment market and R E A has 2% of it (J.S. p. 27a). Appellants at page 12 of their jurisdictional statement say that the effect of the decision below "is to authorize a new operation in the transportation of general freight over virtually the entire nation. The effect upon the motor industry as a whole cannot even be gauged." Whatever may be the legal relevanec of this factual speculation, the record below does not bear it out; if appellants have

85% of the market, if REA has 2%, if REA's annual volume is 60 million shipments, and if the suggested rates generate only 10,000 shipments, the better assessment of the record is to say, "the effect upon the motor carrier industry as a whole cannot even be felt."

Argument

(1) This appeal presents no substantial question warranting plenary review by this court. All the questions involved stem from two aspects of I.C.C. regulation of the two forms of surface linehaul used for express traffic. REA uses highway trucks and rail passenger trains for linehaul. About 5% of the linehaul volume moves by truck (J.S. p. 14a). To move this REA needs, and has received from the Commission highway certificates of public convenience and necessity under Part II of the Interstate Commerce Act, 49 U.S.C. sec 301 *et seq.*, authorizing carriage of "general commodities in express service." (J.S. p. 16a). To move the 95% remainder by rail train under its existing contractual arrangements with the railroads, they and REA need a pooling license from the I.C.C. under section 5(1) of the Interstate Commerce Act, 49 U.S.C. sec. 5(1). This license, issued in *Express Contract, 1959*, 308 I.C.C. 545, is likewise limited to the provision of "express service." (J.S. p. 18a).

Appellants say that the phrase, express service, implies three limitations: (1) it refers to a particular type and size of shipment, (2) it requires the express carrier's price to be higher than appellants' price for the same traffic movement, and (3) it prohibits REA

from providing any service which any of the appellants provide.

As to the first contention the Commission noted that, since 1906 when express transportation became subject to I.C.C. supervision, R E A and its predecessors have traditionally handled shipments ranging in size from 20 pounds to complete rail carloads (J.S. p. 11a). Appellants apparently ask that "general commodities in express service" be construed to mean "general commodities moving in the form of shipments which: (a) weigh less than 500 pounds, or (b) require expedited service, extra service or special handling because of their perishability, fragility or value." (J.S. pp. 5, 16a). The Commission declined thus to construe these words, and said that the limiting element of this phrase is not the words "general commodities" but rather the words "express service." The distinguishing feature of an express transportation company is not the type of shipment it handles, but the type of service provided when handling it.

> "Even if it seemed desirable to do so, there is no basis in this record for defining express service generally in terms of shipment size or weight." (J.S. p. 24a).

> "A definition of express service in terms of perishability, fragility, or value * * * could not be articulated with the precision required for tariff publication." (J.S. p. 25a).

Instead the Commission said that R E A's licenses limit R E A to "perform a particular type of *service*" (J.S. p. 16a). The Commission then pointed to a 1955 decision—the end product of a four-year course

of litigation—setting the five standards which the service of an express company must meet in order to comply with the limiting terms of a highway express certificate of public convenience and necessity, namely *Transportation Activities of Arrowhead Freight Lines,* 63 M.C.C. 573. The Commission listed these (J.S. p. 21a), found that R E A's service met these standards, and therefore concluded that R E A's container rates did not cover a service which failed to conform to the operations authorized by R E A's highway certificates.

Appellants' second contention was that express service requires maintenance of premium prices. The Commission rejected that position as contrary to this Court's rulings concerning destructive transportation competition in *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.,* 372 U.S. 744, 759 (1963) (J.S. p. 15a). The Commission's examiner described as "inconceivable" the establishment of "an almost automatic requirement that would allow the minimum level of express rates to be set by carriers of ordinary freight and thus, in effect, transfer to the latter a managerial discretion rightfully belonging to the express company." (Examiner's report, p. 33).

The third limitation which appellants wanted the Commission to read into "express service" was a prohibition against any sort of competition with general freight carriers. This amounted, the Commission found, to rendering "R E A's authority voidable at the option of its competitors" and such an interpretation would conflict with promotion "of the objectives of the national transportation policy." (J.S. p. 26a).

Thus this three-pronged argument concerns the interpretation of licenses issued by an administrative agency. The question is not the legal limitation of the agency licensing power, but only the meaning and purpose which the Commission had when it issued R E A its rail pooling and its highway motor carrier licenses. The Commission is in the best position to discern, articulate and explain its own meaning and purpose, and the report below supplies good and adequate reason for the interpretation arrived at. Therefore the questions presented are not substantial enough for this court's review.

(2) Appellants complain, however, that the Commission has interpreted these R E A licenses differently in the past and is estopped to alter its prior rulings. The contention is wrong both in its factual premise and its legal conclusion. The decisions to which appellants point[3] are none of them interpretations of licenses issued to R E A. Instead they are the agency opinions pursuant to which these licenses were granted in the first instance. In these, as in all contested Commission highway licensing proceedings, a fundamental issue was the competitive impact of the new market entry sought by the applicant on the existing market entrants who were objecting to the application. To assess this impact the Commission had to form a factual opinion about—not the legal—but the *practical*

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[3] *Railway Express Agency, Inc. Extension—Nashua, N.H.*, 91 M.C.C. 311 (1962) (J.S. p. 9); *Railway Express Agency, Inc. Extension—Durant-Kosciusko*, 34 M.C.C. 111 (1942); *Railway Express Agency, Inc. Extension—Madison, Wis.*, 94 M.C.C. 677; *Railway Express Inc. Extension—West Unity-Middletown*, 31 M.C.C. 363; *Railway Express Agency, Inc. Extension—Charlottesville*, 94 M.C.C. 62; *Railway Express Agency, Inc. Extension—Great Falls, S.C.*, 94 M.C.C. 102 (J.S. p. 11).

scope of competitive operations which the applicant could be expected to institute once the market was opened to him.

R E A, being a well-established carrier whose history of operations extends back over many decades prior to the Motor Carrier Act of 1935, the Commission formed its factual conclusion concerning the likely future scope of R E A competition with motor carriers on the basis of what R E A had been doing in the past. In these decisions the Commission noted that R E A's shipments tended to be much smaller than those of the protestant motor carriers, R E A's prices tended to be higher, and R E A's traffic tended to be more exotic in terms of perishability, fragility and value. Therefore, the Commission rejected the practical and factual contention of the protestant motor carriers that R E A's highway market entry would harm them.

In these decisions the Commission was addressing itself not to what R E A could *lawfully* do but instead to what it was *likely* to do as an express motor common carrier. These descriptions of R E A's actual operations did not constitute a "definition" of express service, i.e. an interpretation of the legal boundaries of the franchises being granted R E A. In point of fact, according to the record below R E A's average operations still are as the Commission's licensing opinions predicted they would be (J.S. pp. 11a-12a). R E A's average shipment weight is still only 50 pounds, more than nine tenths of R E A's shipments weigh less than 100 pounds, and less than 9% of R E A's shipments move under lower express transportation rates than the comparable general commo-

dity motor carrier rates which apply to shipments weighing 100 pounds or more.

However, even if the Commission had changed its definition of express service below, that too lies within the lawful scope of agency power and raises no question substantial enough for this court's review. The Commission and other agencies have often changed their minds and been upheld when they did so. This is particularly true when the question at issue is the interpretation of a carrier license. *Ace Lines, Inc.* v. *The United States,* 197 F. Supp. 591, 598-599 (S.D. Iowa 1960).

As the Federal District Court in Louisiana has noted in *Coyle Lines, Inc.* v. *United States,* 115 F. Supp. 272, 279 (E.D., La. 1953), "It may be that the findings of the Commission in the case at bar appear inconsistent with its findings in the *Commercial Barge Lines* case. However, as said by Mr. Justice Brandeis in *Virginian Railroad Company* v. *United States,* 272 U.S. 658, 666, 'This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions *or with the alleged inconsistency with findings made in other proceedings before it.*'" (Emphasis supplied). In accord are *Northern Pacific Railway Company* v. *United States,* 41 F. Supp. 439, 446 (D. Minn. 1941) aff'd. 316 U.S. 346 (1941); *Virginia Stage Line* v. *United States,* 48 F. Supp. 79 (W.D. Virginia 1942); *N.L.R.B.* v. *Baltimore Transport Co.,* 140 F.2d 51, cert. den. 321 U.S. 795 (4 Cir., 1945); *WOKO Inc.* v. *Federal Communications Commission,* 153 F.2d 623, 631 (App. D.C., 1946), rev'd 392 U.S. 223, 227-8; *Churchill Tabernacle* v. *Federal*

Communications Commission, 160 F.2d 244, 246 (App. D.C., 1947); *State Airlines, Inc.* v. *Civil Aeronautics Board,* 174 F.2d 510, 518 (App. D.C. 1949), rev'd. on other grounds, 338 U.S. 572 (1950); *Western-Inland Mail Rates,* 14 C.A.B. 201, 250-251, 253-254 (Docket 2870, Order E-5467, June 26, 1951), modified for other reasons *sub nom. Summerfield* v. *Civil Aeronautics Board,* 207 F.2d 200 (App., D.C., 1953); *Motor Freight Express* v. *United States,* 119 F. Supp. 298, 305 (M.D., Pa., 1954); *ABC Freight Forwarding* v. *United States,* 169 F. Supp. 403, 405 (S.D., N.Y. 1959).

Judge Magruder has supplied with clarity the explanation of any precedents which appear to conflict:

> "Petitioners * * * claim that prior Commission decisions * * * must be adhered to by the Commission or specifically announced as abandoned. * * * The courts have many times held that the findings of the Commission may not be attacked because they are inconsistent with findings made in other cases. * * * *Where,* as in the instant case, *the findings are on their face adequate and explain the basis for decision,* there is no occasion to examine consistency with prior decisions." *M & M Transportation Co.* v. *United States,* 128 F. Supp. 296, 300-301 (D., Mass., 1955). (Emphasis supplied).

In short, the alleged conflict between the "definition" of express service in the proceeding below and in prior Commission cases raises no question substantial enough for this court's review both because the conflict does not exist and because, if it did exist,

the Commission in the discharge of its regulatory functions is under no duty to avoid such conflict *per se*.

(3) Appellants imply that the Commission decision below amounts to the issuance to railroads of a national license to go into the trucking industry. A less appropriate case could hardly be imagined for resolution of such a question. It can pertain only to the highway linehaul of express traffic. Only 5% of *total* express traffic moves by highway. Only 10,000, or 0.02% of R E A's 60,000,000 annual shipments a year move in containers. Thus the case raises a question concerning only one twentieth of less than two hundredths of one per cent of R E A's traffic. Inasmuch as the national ratio of express to general motor carrier tonnage is 2:85 (J.S. p. 27a), the alleged railroad salient in the motor carrier market is so minute as to defy measurement.

In any event the question is not substantial because the Commission requires *all express traffic,* whether rail or highway, to be given service which meets the five benchmarks set out in the *Arrowhead* case, supra, and counsel for the motor carriers conceded below in argument before the Commission sitting *en banc* that general commodity carriers do not compete at these service levels:

> "Mr. Rea: I wouldn't concede that the motor carriers refused to handle small shipments. They do handle them—too many they say. But they don't give them the service because they are not geared to giving them the service that R E A

> traditionally can, traditionally has and can give them. * * * R E A can very quickly and easily establish that it is rendering a service * * * respecting small shipments which the motor carriers do not render,—whether they can or could is beside the point—they do not render it." (Tr. p. 1877)[4].

No question can arise of express invasion of the motor carrier market when less than one ten-thousandth of that market is at stake, and when the Commission compels R E A to maintain service standards well above those which the motor carriers are willing to meet.

(4) Appellants' final contention is that, assuming the correctness of the Commission's definition of express service, R E A's container tariff No. 52 causes R E A's service to fall below the Commission's *Arrowhead* bench marks. The Court below dealt with this so ably and succinctly that its words bear repeating:

> "Plaintiffs contend that even under the five criteria, the container tariff is inconsistent with R E A's authority as an express carrier. This calls for a brief analysis. Criteria (1) and (2), fn. 3, *supra,* are closely related. (1) is that an express agency must 'transport any commodity which may be safely transported in ordinary van-type equipment.' Although, as previously mentioned, R E A excepts certain items from its container service tariff, it holds itself out to transport the excepted items under its other tariffs.

[4] Because of its illuminating candor further excerpts from this argument are set out in Appendix A.

(2) is that it must provide such care and security as the commodity may require. Contrary to plaintiffs' intimations that commodities not demanding special treatment are within the exclusive domain of freight carriers, R E A would certainly fail in its obligations if it refused to carry goods because they were not valuable or did not require special care.

"Criterion (3) is that all shipments be handled with equal expedition from point of pickup to point of delivery. Plaintiffs do not contend that, once the container is in R E A's hands, it is transported less expeditiously than other express shipments. Plaintiffs do argue, however, that R E A fails to meet this criterion because the shipper has 48 hours free use of the container before and after shipment. We cannot agree. Obviously, it takes little time to load the container. The shipper's independent decision when to initiate the shipment cannot be imputed to the carrier if, as is the case, the carrier is willing and able to pick up, transport, and deliver the lading expeditiously on being called upon to do so. Any shipper of a single article, or of many articles in his own container, has an equal option.

"As for criterion (4), plaintiffs do not contend that R E A's transportation of the containers does not follow firmly fixed schedules, with fixed delivery times. And, although the meaning of criterion (5)'s 'relatively simple billing (and) rate structures' is not entirely clear, there is no suggestion that R E A's rate structure is not simple, even with this added tariff." (J.S. pp. 4a-5a).

In their jurisdictional statement appellants especially object to the commodity exclusions in the container tariff, e.g. human remains. They do not contest the Commission's findings that the excluded commodities do not "lend themselves readily to movement in the described containers" (J.S. p. 22a). Nor do they contest the District Court's finding that any commodities excluded by the container tariff are covered by other express tariffs (J.S. p. 4a).

Thus appellants' final argument presents no substantial question concerning the holding out by R E A of an express service. Obviously this holding out does not have to be made within the covers of a single tariff schedule—and this case concerns only one of many R E A tariff schedules, all of which cover service between the 35 cities here involved.

Conclusion

For the foregoing reasons this appeal presents no substantial question, probable jurisdiction should not be noted, and the judgment below should be affirmed.

RAILWAY EXPRESS AGENCY, INC.,
Appellee, by its attorney,
WILLIAM Q. KEENAN
219 East 42nd Street
New York, N. Y. 10017

October 21, 1966

Certificate of Service

I, WILLIAM Q. KEENAN, attorney for Railway Express Agency, Inc., appellee, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 21st day of October, 1966, I served copies of the foregoing document on the several parties to this appeal as follows:

(1) On New England Motor Rate Bureau, Inc., et al., appellants, by mailing copies in duly-addressed envelopes, with postage prepaid, to Peter T. Beardsley and R. Edwin Brady, Esqs., 1616 P Street, N.W., Washington, D. C. 20036; to Guy H. Postell and Frank D. Hall, Esqs., 1375 Peachtree Street, N.E., Atlanta, Georgia 30309; Bryce Rea, Jr. and Burton Fuller, Esqs., 917 Muncey Building, Washington, D. C. 20004; John W. McFadden, Esq., 316 East Ohio Street, Chicago, Illinois 60611; Harry C. Ames, Esq., Transportation Building, Washington, D. C. 20006; LeGrand A. Carlston and Z. L. Pearson, Jr., Esqs., P. O. Box 5746, Terminal Annex, Denver, Colorado 80217; J. D. Lawson and George D. Michalson, Esqs., P. O. Drawer 647, Kansas City, Missouri 64141; Roland Rice, Homer S. Carpenter, John S. Fessenden and Richard R. Sigmon, Esqs., 618 Perpetual Building, Washington, D. C. 20004.

(2) On the United States, by mailing copies, in duly-addressed envelopes, with postage prepaid to Honorable Thurgood Marshall, The Solicitor General, Department of Justice, Washington 25, D. C.; to Howard Shapiro, Esq., Anti-Trust Division, Department of Justice, Washington 25, D. C.; and to

W. Arthur Garrity, Jr., Esq., United States Attorney, 1107 U.S. Post Office & Courthouse Building, Boston 9, Massachusetts.

(3) On the Interstate Commerce Commission, by mailing copies in duly-addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Leonard Goodman, Esq., Associate General Counsel at the office of the Commission, Washington 25, D. C.

WILLIAM Q. KEENAN

APPENDIX A

Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission *en banc* in Docket 33977

Commr. Tuggle: Apparently the REA was performing a superior service in the 2,000 to 3,000 pound class.

Mr. Rea: At one point I am sure it was.

Mr. Tuggle: Until the motor carriers increased their efficiency and invaded that field, and by equalizing their services with the services of REA, so you argue, that per force that forced REA down and down and down until you don't know where to stop.

Mr. Rea: It could well be, Commissioner Tuggle, that will be the answer. It could well be that REA has outlived its usefulness.

* * * *

If the Commodity A that Carrier X is certificated to haul stops moving, he goes out of business. Unfortunately his certificate doesn't enable him to invade the territory of Carrier B.

Now, if it is possible, if in fact REA is no longer able to get business in the 2,000 pound weight bracket, in express service, that is no more justification for their invading general freight service, which they are not authorized to perform, than would the face that Carrier X restricted to the haulage of Commodity A should be allowed to haul Commodity B, just because Commodity A is no longer moving.

Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission en banc in Docket 33977

Commr. Murphy: You are not comparing like to like. * * * The express company, of course, is a general commodity organization.

Mr. Rea: True.

Commr. Murphy: Do you feel this rate situation you are speaking of here, this isn't something new as far as the Express Company competing with the motor carriers, is it?

Mr. Rea: No, Your Honor, it is not something new. The Express Company is entitled to compete with motor carriers.

* * * *

That, to me, is the crux of the case, not whether REA competes with us, but whether they compete with us within the sphere of activity, within the sphere of service assigned them under the Act. * * *

Commr. Tuggle: You wouldn't accept the statement, of course, that the motor carriers were beginning to perform an express service when they improved their efficiency so that they could take traffic away from REA, which was performing an express service by doing the very same function and perhaps doing it better. You wouldn't contend that was an invasion of the express field?

Mr. Rea: I would say this, Commissioner Tuggle, no, it is not an invasion of the express.

Commr. Tuggle: What distinction do you make?

Mr. Rea: I would make the distinction the Commission itself made most recently in the Nashua Case.

Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission en banc in Docket 33977

The Commission has always intended the term "express service" to mean generally the expedited handling of small parcel traffic which common carriers of ordinary freight do not desire usually, or are not able to perform. (Tr. 1871-1874).

* * * *

Mr. Rea: I wouldn't concede that the motor carriers refused to handle small shipments. They do handle them—too many they say. But they don't give them the service because they are not geared to giving them the service that REA traditionally can, traditionally has and can give them. * * * REA can very quickly and easily establish that it is rendering a service * * * respecting small shipments which the motor carriers do not render,—whether they can or could is beside the point—they do not render it.

It is the premium service of REA in relation to the services available through the general freight carriers, and that is the crucial issue, it seems to me, in determining the limits of REA's operating authority, if you please. What is the nature of the service in relation to existing services of general freight carriers? Is it or is it not premium?

Commr. Freas: Right on that point, Mr. Rea, if I follow you correctly, you are conceding to the Railway Express Agency the right to transport shipments of this low weight area because their service is of a higher quality you say; it is a premium service compared to the highway carriers, the way I understand

you. Now my question is, assuming now that the highway carriers would elect to improve their service to make it equal to that of Railway Express Agency, will that then make the service of the Railway Express Agency today carrying on properly, illegal simply because it is no longer a premium service?

Mr. Rea: REA would not then be rendering express service.

Commr. Freas: In other words, then it makes no difference what the Railway Express does, if it is doing something that is legal today and doesn't change its practice one iota, but if its competitors improve their service so as to change the relationship from the standpoint of one being superior to the other, then it is by reason of the action of the motor carriers that a legal service becomes illegal, is that your argument?

Mr. Rea: Commissioner Freas, *I think that is necessarily the argument* because that is the basis upon which the Commission itself has differentiated express service from regular, ordinary freight service.

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Mr. Rea: Your Honor, it is quite conceivable the motor carrier service—it is conceivable, I doubt it will happen—but it is conceivable the motor carrier service could so far improve that express service would dry up altogether and the REA, absent legislative relief, would go out of business. If we reach that point—just one moment if I may—if we reach that point it may be legislation may be necessary.

Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission en banc in Docket 33977

But what I am saying under the Act as it is now written, and under the definition of "express service" as being a premium service in relation to other services, if the REA service is no different than ordinary motor carrier service, ordinary forwarder service, it ceases to be express service. We have a relative concept. (Tr. 1877-1879).

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Commr. Tuggle: * * * Assume that REA is performing an express service, say pickup and delivery, going back some time, and that is the only superiority that it has over motor carriers, but then the motor carriers begin to perform pickup and delivery, so in that particular instance REA is no longer superior, it is exactly equal. Has it forfeited its right then to continue to handle that traffic that it has been handling because the motor carrier can now do it as well as it can?

Mr. Rea: I would say, Commissioner Tuggle, yes. REA is foreclosed from holding itself out to the public to offer any service that is not superior to the general freight service available. So that whatever the general freight carriers do, REA must do more of, it must do better if it is to stay within the concept of express service.

Commr. Hutchinson: *So that express service is really a service that motor carriers do not render or are unwilling to render?*

Excerpts from Argument by Bryce Rea, Jr., Esq., Attorney for National Motor Freight Traffic Association, before the Commission en banc in Docket 33977

Mr. Rea: It is a service that the motor carriers do not or are unwilling to or cannot feasibly render.

Commr. Hutchinson: Does the motor carrier then who does not render an express service, which I understand you to say they are authorized to render—does a motor carrier who fails to render an express service violate the terms of his certificate, or does he violate or fail in any way to meet the responsibilities that he has by virtue of the authority contained in the certificate?

Mr. Rea: No, Your Honor, the motor carrier's responsibility is to render transportation with reasonable dispatch. (Tr. 1887-1888).

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